

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 16,243
)
Appeal of)

INTRODUCTION

The petitioner seeks expungement of a finding by the Department of Social and Rehabilitation Services (SRS) that he abused his nine-year old son by placing him "at risk" of physical harm by pointing a loaded handgun at him.

FINDINGS OF FACT

1. On Friday, December 18, 1998, a district office of SRS received a call from a school principal reporting that TJ, a nine-year-old boy, had told him and another teacher that his father had pointed a gun at him over the past weekend and that he feared being picked up by his father after school that day because he usually has a gun. The principal, who testified at the hearing, noted that the boy, whom he described as friendly but immature, had approached a school secretary with this information. The secretary alerted the principal who called TJ in to talk with him. He noted that TJ was nervous and that he said that his father had pointed the gun at him while he was in bed. He told the principal that he asked his father to

"please not shoot him" and his father put the gun down. He also described the gun in detail. At the principal's request, a teacher, who had taught TJ for four years, talked with him as well. She testified that TJ told her that his father had held a gun at his head while he was in the bedroom at his uncle's house and that he had put it down when TJ asked him to. TJ appeared shaky and scared. The teacher got the impression that TJ was genuinely nervous about something and recommended to the principal that SRS be contacted to investigate whether he was in danger.

2. An SRS investigator was assigned to the case and went to the school that afternoon to interview TJ. She also contacted the state police who sent a trooper who was present during part of the interview. The investigator brought in a special education teacher during the interview as an "impartial person." She did not tape the interview with TJ because the office workload was too heavy to transcribe a tape. The investigator said it was difficult to remember all the details of an interview that happened a year and a half ago but that she had her reports to rely on. She could not remember, however, when she wrote the reports and admitted they could have been written up to a month after the actual interview. She recalls talking with

TJ for about 45 minutes to an hour and observing that he was nervous and upset during the interview. She asked him about the difference between fantasy and reality, and between truth and a lie and did not feel he had a problem in those areas. She recalls that TJ told her that he was at his Aunt Julie's house over the weekend and was sleeping on the couch. When he woke up he saw that his father had a gun pointed at him. He says he asked his father, "please not to shoot." He then described wrestling with his father, taking the gun away from him and taking the bullets out of the gun which were taken to another relative's house for safekeeping. He also said that sometime earlier he had seen his father put the gun to his own head during a nighttime conversation with his mother and that he heard a click. He described taking the bullets out of the gun and hiding them after that incident.

3. Following her interview with TJ, the investigator waited for the boy's father to arrive at the school. The petitioner arrived with his own mother and was asked by the trooper if he could search his car. He agreed and no guns were found. At that point the trooper left and the SRS worker proceeded to interview the petitioner. This interview was not tape-recorded. During this interview TJ was present and greeted the petitioner with the statement

that he had not said anything about a gun. TJ was nervous and crying and asked to go home with his father. During the interview TJ sat on the petitioner's knee and TJ's grandmother was in the room. The investigator thought that the petitioner looked depressed. He told the interviewer that he was unemployed and had no place to live and had been going from relative to relative for shelter. He denied ever pointing a gun at his son and was unsure as to why his son might make such a statement. According to the petitioner's mother, the investigator asked him three times whether he was calling his son a liar although the investigator does not recall making such a statement. The petitioner offered that TJ may have misinterpreted something he had seen such as him taking the gun apart during some time in the recent past. He also confirmed that he had put a gun to his own head during the last summer during an argument with TJ's mother, but he did not believe TJ had seen this event since he and his sister were sleeping when this occurred. The investigator understood the petitioner to say the he had a poor memory about these events and that it "could have happened."

4. The SRS worker believed at that point that TJ's parents were divorced and she advised the petitioner that the Department

W

[illegible][illegible][illegible]

separation and was depressed, taking medications and drinking too much. They were extremely concerned that he had a gun because they feared that he might use it on himself and they all made attempts, detailed below, to keep the gun out of his hands. There was no concern on the part of the family that he would use the gun to harm either of his children as they had never seen him behave in a threatening or abusive manner toward them.

8. The petitioner went to live with his brother, K., sometime around November 7, 1998 when his wife "threw him out." He brought his handgun, clothing and some other belongings with him. K. saw the petitioner cleaning the gun soon after he moved in and the petitioner asked if there was a place to target practice. K. took the gun away from his brother and placed it in a drawer. He was not aware that his brother touched the gun thereafter. Sometime around November 18, 1998, he moved to his brother T's home but did not bring his belongings. T. has a wife and three children, and while he was at his home the petitioner slept in a shed area on a couch. Sometimes TJ was a visitor there (e.g. the weekend of November 21), but he was there all of the time after November 23, 1998 when the petitioner got custody of him. All of the petitioner's

belongings, including his gun, were taken to his mother's house for safekeeping by brother K.

9. A day or two after Thanksgiving, the petitioner went to pick up his belongings, including his handgun, from his mother's house. When he brought the handgun back to brother T.'s house, the petitioner asked T. to put it in a safe place where he could not get it. T. was concerned that his brother would use the gun on himself and padlocked it in a metal box. It remained in the box for a couple of days until the petitioner moved to his sister's house.

10. The petitioner and TJ moved sometime around November 30 to his sister's house. His sister lives in a small mobile home with her husband and three children. She gave her children's bedroom to the petitioner and TJ and her children slept on the couch in the living room. The petitioner's sister was aware that he was bringing a handgun into her house (which he had just obtained from his brother T.'s padlocked box) and told him that she wanted him to disable the gun because she feared for the safety of her children if they should find it. The day he moved in, the petitioner dismantled the gun into small pieces (although his sister did not observe him doing this) and gave her the pieces. The sister put the pieces into a sack

and hid them in a closet, not telling anyone where the pieces were.

11. On December 4, 1998, TJ left the aunt's house due to the court's restraining order and did not return. The petition for the restraining order was based on allegations of abuse towards his wife, not his children, and was dismissed on December 15, 1998 after the petitioner agreed that his mother would supervise his visits with the children. The petitioner was to see TJ on December 18, 1998 for a visit and was to be accompanied by his mother pursuant to the court order. He did not see TJ between December 4, 1998 and December 18, 1998.

12. All of the petitioner's siblings and his mother testified credibly that TJ was happy to be with his father and had not shown any fear of him during the two weeks or so that they had been together prior to December 4, 1998. The living spaces of each of the families with whom the petitioner resided were cramped and they were all forced to live in close proximity with him and TJ. They were unaware of any incident such as the one described by TJ. In addition, neither of the uncles nor the aunt had been approached by TJ with regard to hiding a gun or bullets. Although it appears from their testimony that the petitioner had limited access to his gun and was frequently

with family members during this period of time, it cannot be found that he had no access to his gun or that he was never alone with his son during the weeks following the separation.

13. The petitioner testified at the hearing that he had never and would never point a gun at his son. He admitted that he had pointed a gun at his own head during the summer during an argument with his wife but he did not do so in front of TJ or his sister whom he believed was sleeping. He agreed with the accounts of his siblings regarding his turning his gun over to them for periods of time but did not testify that he never had access to the gun. He added that even though he had taken his handgun with him, he had left the bullets at his brother T.'s home. He had been taking antidepressants at the time at issue but denies that his memory was so clouded that he would not have remembered pointing a gun at his son. His memory was mostly affected as to dates and such. While he admits that he had been drinking too much during this period, he claims that he never drank when his children were around. He states that if TJ were correct that a gun was pointed at him it would have been unintentional during a time when he was cleaning or disassembling the gun, but not on purpose. He denies that he ever told the SRS investigator that the

incident "could have happened because he had a poor memory." This latter denial is found to be credible.

14. Although many of these facts were not known at the time of the original substantiation, they were brought to the attention of SRS through two reviews conducted by the Department, the first, a "Level 1" review, which continued the substantiation per a letter dated July 9, 1999 and, the second, a "Commissioner's Review", which again upheld the decision per a letter dated November 29, 1999 which concluded that the petitioner had placed his son at risk of harm by pointing a loaded gun at him.

15. At the hearing, TJ's mother asked that he be exempted from testifying because it would be too traumatic for him. SRS agreed with this request. The hearing officer declared that the trauma to TJ created a hardship for the Department in producing evidence and, pursuant to Fair Hearing Rule 12, agreed to admit hearsay evidence as to the child's statements subject to an assessment of whether it was reasonable to rely on those statements as accurate. To that end, the principal, the teacher and the SRS investigator were allowed to testify as to what the child told them, as set forth in paragraphs 1 and 2 above, over the objections of the petitioner. Following an assessment of all the evidence, the hearing officer

concludes that it is not reasonable to find that the hearsay testimony is reliable. It is likely that TJ did at least say that "his father had pointed a gun at him during the previous weekend" (December 12 or 13, 1998) since that statement was repeated by three witnesses with consistency and it is likely that he was fearful of something since he appeared nervous to all three witnesses. But it is not fair to conclude from that statement that the fact occurred. The hearsay evidence in paragraphs 1 and 2, above, is rejected as accurately reporting what occurred for the following reasons:

- A. TJ was not with his father on December 12 or 13 by order of the court and had not been with him since December 4.
- B. TJ made inconsistent statements on the same day about where he was when this event allegedly occurred, telling one witness he was with his uncle and another that he was with his aunt.
- C. TJ made inconsistent statements on the same day about what happened after the gun was allegedly pointed at him, telling one witness that his father

put the gun down and another witness that he had
to
wrestle the gun away from his father.

D. TJ 's allegation that he wrestled the gun and
bullets from his much larger father is highly
unlikely, casting doubt on the veracity of the
rest
of the statement.

E. TJ's allegation that he took the bullets to one
of
his uncles' or aunt's homes for safekeeping was
not
investigated by SRS or corroborated by their
testimony.

F. No evidence was offered that TJ was questioned
about
whether he believed the gun was loaded and why he
believed that. This is an important finding in
order to establish an actual "risk of harm", the
allegation made by SRS in this matter.

G. TJ was the subject of a custody dispute in which
his mother had made allegations of abuse against
his

father. No questions were posed to TJ as to whether his fear about his father's gun might have come from statements made to him (or which he overheard) by his mother or other persons or because he might have seen, or at least had heard, about the incident where his father held a gun to his own head.

These important questions were not posed to TJ because the investigator was unaware of the custody dispute at the time of the investigation.

H. Most importantly, there was no verbatim record made of the questions asked of TJ at the time of his initial interview making it impossible to tell what attempts had been made at that time to test the truth of the accusation through close questioning.

The investigator had no memory of all the questions

she had actually asked him (or not asked him) and her reports, in addition to having been prepared considerably after the fact, do not contain this kind of detail.

ORDER

The request of the petitioner to expunge SRS' finding that he abused his son by placing him at risk of harm is granted.

REASONS

The Department of Social and Rehabilitation Services is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are "unsubstantiated". 33 V.S.A. §§ 4914, 4915 and 4916.

The statute further provides:

A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is not substantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under section 3091 of Title 3 on the application at which hearing the burden shall be on the Commissioner to establish that the record shall not be expunged.

33 V.S.A. § 4916(h)

In order to sustain its burden of proof in these matters, SRS is required to show that the registry report is based upon accurate and reliable information that would lead a reasonable person to believe that a child is abused" See 33 V.S.A. § 4912(10).

33 V.S.A. § 4912 (2) defines an "abused or neglected child" as "a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. . . ." 33 V.S.A. § 4912(4) further defines "risk of harm" as "a significant danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical injury, neglect, emotional maltreatment or sexual abuse."

There is no question that a child who has a loaded gun pointed at him is "abused" because he or she is placed at "risk of harm" as defined in the above regulation. The Department acted correctly in following up the allegations in this matter and taking quick steps to protect the boy. When the matter came forward for a hearing, however, the Department had the burden of showing that there was

accurate and reliable information proving that the allegations actually occurred. The Department failed to meet that legal burden in this case and so the petitioner is entitled to his request to expunge the finding.

It must be noted that the Department attempted to meet its burden in this de novo hearing entirely through the submission of hearsay evidence. This kind of evidence is not admissible at all by the Vermont Rules of Evidence in regular judicial proceedings because it is considered unreliable, prejudicial and unfair. See. V.R.E. 802. Although the hearsay exclusion rule applies at HSB hearings, the hearing officers do have the authority to make exceptions to this admissibility rule but may only do so if there is an unnecessary hardship (such as trauma to the child) and "the evidence offered is of a kind commonly relied upon by reasonably prudent persons in the conduct of their affairs." Fair Hearing Rule 12. The hearing officers have frequently admitted depositions and tapes or transcriptions of the actual SRS interviews in expungement hearings and have relied on information in them if the

See In re Bushey-Combs, 160 Vt 326, 628 A.2d 541 (1993).

The Vermont Supreme Court has ruled that the hearing officers may not allow hearsay evidence in unless the under-ten child is brought in to testify in sexual abuse cases under V.R.E. 804a. See In re C.M., 168 Vt. 389 (1998).

interviews were well-conducted and probing. See e.g. Fair

The Board had noted repeatedly that the Department's failure to tape record interviews with children is always perilous,

Hearings No. 13,729 and 15,055. However, recollections of persons as to the child's statements, especially when those statements occurred months or years ago, are often selective and inaccurate and do not have the same degree of detail or reliability as written transcripts. It is almost always impossible to tell from such evidence what kind of probing was done to determine the accuracy of the child's statement--an important factor in determining whether it is reliable enough to adopt as a fact at the hearing. While witness recollections of a child's statement might be admissible in addition to or as corroborating evidence, such evidence is usually insufficient alone as a basis to make a finding on the central issue. To find that a pivotal event occurred based upon that kind of testimony is unfair to the petitioner and must be avoided by a tribunal attempting to conduct a "fair" hearing.

#
